Filed 2/18/05 P. v. Lopez CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARTIN LOPEZ, Defendant and Appellant.	B169078 (Los Angeles County Super. Ct. No. TA069392)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed.

DiIorio & Hall and Martha M. Hall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, and Timothy M. Weiner, Deputy Attorney General, for Plaintiff and Respondent.

Martin Lopez appeals from the judgment entered following his conviction by jury of possession of heroin for sale (Health & Saf. Code, § 11351), with court findings that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)), a prior felony narcotics conviction (Health & Saf. Code, § 11370.2, subd. (a)), and a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)). He was sentenced to prison for 10 years.[1]

In this case, we hold the trial court did not reversibly err by denying appellant's *Marsden* motion. We also hold the court did not reversibly err by denying appellant's motion to represent himself.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on April 3, 2003, Los Angeles Police Officers Guadalupe Ruiz, Trevor Larsen, and Hubert Nino went to the house at 137 West 90th Street in Los Angeles to execute a search warrant and investigate narcotics sales.

After the officers, pursuant to the warrant, entered the house, they saw appellant lying face down in the closet of the southwest bedroom. Appellant was detained. The bedroom was searched and police found, concealed in a crevice between the door frame and ceiling, a clear plastic baggie containing bindles of heroin. Ruiz, based on his training and experience, opined at trial that the heroin was possessed for sale. Police also found in the bedroom a broken glass tube, commonly called a coke pipe, and a letter addressed to appellant. Keys to the house and southwest bedroom, $71 dollars in currency, and an additional small amount of heroin were recovered from appellant's person. A pay/owe sheet and additional drug

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[1] On November 23, 2004, appellant filed a petition for a writ of habeas corpus (B179357) and, on December 6, 2004, this court ordered that his appeal and the petition be concurrently considered. The petition will be the subject of a separate order.

paraphernalia were recovered from the living room. Appellant presented no defense evidence.

CONTENTIONS

Appellant contends: (1) "The court committed reversible error when it denied appellant's request for new and competent counsel," and (2) "The trial court erroneously denied defendant's motion to proceed pro per."

DISCUSSION

1. *The Trial Court Did Not Reversibly Err by Denying Appellant's Marsden Motion.*

Appellant claims the trial court's denial of his *Marsden* motion was error because his trial counsel failed to file timely a motion to traverse a search warrant. We conclude *post* that the *Marsden* motion was properly denied since appellant failed to show that the motion to traverse should have been granted even if it had been filed timely.

a. *Pertinent Facts.*

(1) *The Warrant.*

On April 3, 2003, a search warrant was issued which commanded, inter alia, a search of the 90th Street premises for "[r]ock cocaine; cocaine; and narcotic paraphernalia[.]" In the supporting affidavit of probable cause, Ruiz, the affiant, stated as follows. Ruiz had been a police officer since 1993, and was currently assigned to narcotics division. Ruiz had "participated and initiated in" over 100 narcotics arrests for "possession, possession for sales and transportation of heroin, cocaine, marijuana and methamphetamine." Working undercover, Ruiz personally had bought narcotics. He had taken part in several controlled buys of narcotics utilizing confidential reliable informants, and had testified in superior court as a narcotics expert.

On Wednesday, March 26, 2003, Ruiz received information from an anonymous person that the "occupants" of the 90th Street residence were involved in the sale of rock cocaine. Ruiz stated that, "[d]uring the same week," Ruiz and his

partner, Los Angeles Police Officer Owens, arranged for a confidential reliable informant (CRI) to try to make a controlled narcotics buy from the location.

The CRI had provided information in the past which resulted in narcotics seizures and the apprehension of narcotics traffickers. To Ruiz's knowledge, the CRI had never lied when furnishing information concerning persons involved in narcotics violations. Ruiz and Owens questioned the CRI at length and found the CRI to be extremely knowledgeable in the packaging, appearance, and use of narcotics. The officers searched the CRI for money or contraband and found none.

Ruiz and Owens drove the CRI to the vicinity of 137 West 90th Street, and Owens gave police funds to the CRI. Ruiz stated he "maintained a visual" of the CRI and saw the CRI approach the residence at that address and "walk towards the front door out of my view." About three minutes later, Ruiz saw the CRI reappear and exit the property. Ruiz "maintained [his] visual" until the CRI reached a "pre-arranged meet location." The CRI entered the officers' unmarked police vehicle.

Once inside the vehicle, the CRI handed Owens an off-white solid resembling rock cocaine. The CRI stated that the CRI approached the chain link gate and saw three or four Black males "loitering" on the front porch area of 137 West 90th Street. The Black males appeared to be gang members. The CRI was then directed by a Black male to the east side window of the residence. Upon reaching the window, the CRI was instructed to place the money in the "cutout slot" of the window. An "unknown suspect" retrieved the money, then handed the CRI an off-white solid resembling rock cocaine. The CRI stated that the CRI could not identify the suspect since a black plastic sheet lined the window.

Based on the above information, Ruiz formed the expert opinion that upon execution of the warrant at 137 West 90th Street, rock cocaine would be seized with other evidence tending to show a conspiracy between the "male Blacks at the location and others to buy and sell rock cocaine."

(2) *Further Proceedings*.

On May 5, 2003, appellant was represented by court-appointed counsel, Tracy Grayson, at appellant's preliminary hearing. On May 19, 2003, Darcy Calkins, court-appointed counsel, represented appellant at arraignment, where appellant pled not guilty. The court, department SCO (SCO), Judge Gary Daigh, presiding, ordered a pretrial conference for June 4, 2003, in SCO, and a jury trial for July 18, 2003, in department SCD (SCD). The court also ordered that "all pretrial motions and discovery compliance to be heard 30 days prior to trial."

At the June 4, 2003 pretrial conference, appellant was in court and represented by Grayson, appellant's court-appointed counsel. On appellant's motion, the conference was continued to June 20, 2003, in SCO. According to the June 20, 2003 minute order, the case was called on that date for the pretrial conference before Judge Gary Hahn. Appellant was present in the lockup, but Grayson did not appear. Apparently, Grayson appeared in Judge Daigh's courtroom but it was dark and he did not learn that Judge Daigh's calendar was transferred to Judge Hahn. It appears that appellant was not in the courtroom during the above June 20, 2003 proceedings.

On July 17, 2003, appellant filed a motion to traverse the search warrant and suppress evidence. The written motion sought suppression of "heroin." The motion reflects that it was signed by Grayson on July 8, 2003. The motion in the superior court's file does not contain a proof of service or reflect if or when the motion was served on the People.[2] The motion indicated that it was based, in pertinent part, on the notice of motion, supporting declaration of Grayson, memorandum of points and authorities, and "all other papers, [and] records, . . . on file in this action, . . ."

Grayson's supporting declaration stated that "Contrary to the allegations in the affidavit, the affiant made statements that were deliberately false or in reckless

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2 The superior court file has been transmitted to this court.

disregard of the truth; and the remaining portion of the affidavit is insufficient to justify a finding of probable cause."

In his unsworn memorandum of points and authorities, appellant urged, "In the present case, the affiant stated in the affidavit supporting the warrant that rock cocaine could be purchased from Black males at 137 W. 90th Street in Los Angeles. Based on this blatantly false information, a search was conducted, but no Black males were found on or about the premises, and no rock cocaine nor any other form of cocaine was found on the premises, nor on any person (all of whom were Latino, not Black) found on or about the premises."

Appellant also urged that, once the false allegations were excised from the affidavit, there was no showing of probable cause. Appellant further urged, "The search was based solely on the affiant [*sic*] supposedly having purchased rock cocaine from Black males. This was simply not true, and the affiant made the statements knowing this was not true. The affiant [*sic*], whom the officers had relied on in the past, allegedly purchased rock cocaine from three to four Black males on March 26, yet only eight days later, the premises are suddenly occupied by Latinos in possession of small amounts of *heroin*? One can only conclude that the statements were not true when the affiant made them in support of the warrant issued and executed in this case." (Italics in original.)

On Friday, July 18, 2003, the case was called for trial in SCD, Judge John Cheroske, presiding. The court asked if Grayson were present, and the court stated "[w]e have his client Martin Lopez[.]" The People announced ready. Grayson later asked for second call because "there was a problem on June 20th with the court which was the pretrial. The court was closed in division [*sic*] O.[**3**] I have not had an opportunity to speak with the prosecution." The matter was placed on second call.

The court called the case later and stated that appellant was in custody. The court asked what the status of negotiations was, and Grayson indicated appellant

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3 This was apparently a reference to SCO.

wanted to go to trial. The court then noted that appellant had filed a motion to continue and the court (apparently in response to appellant's indication that he wanted to go to trial) asked if the motion to continue were withdrawn. Grayson replied in the affirmative.

The court also noted that appellant had filed a motion to traverse the search warrant. Grayson told the court that the motion to traverse was not withdrawn. Judge Cheroske then stated, "The court rules it's untimely. Date set for the cut off in filing all motions of the case as of the date of his arraignment was on June 4th, 2003. So it's denied on its face as untimely." (*Sic.*) The matter was transferred to Judge Daigh for trial with a time estimate of two or three days. It appears that appellant was not in the courtroom during the above July 18, 2003 proceedings.

Later that day, in SCO, Judge Daigh, presiding, the case was called. Grayson later commented that he had come to the courtroom on June 20, 2003, but it was closed. Judge Daigh confirmed that his courtroom had been closed that date. Grayson later indicated that on July 8, 2003, he had served the prosecutor with the motion to traverse, and Judge Cheroske had denied it as untimely. Judge Daigh indicated he had no authority in the matter since Judge Cheroske had ruled on the motion.

Appellant personally addressed the court and indicated that he had not been present at any of the proceedings. Judge Daigh noted that a pretrial conference had been scheduled (apparently a reference to the June 20, 2003 pretrial conference), and it appeared that a logistical problem had occurred and that the court next door had called the matter. Judge Daigh also noted that no one had appeared, no pretrial conference had occurred, and the matter had been taken off calendar. Appellant agreed. Appellant observed that a date had been set for pretrial motions and, when appellant arrived, he was told Grayson was not present. Appellant indicated he had not been called out of the lockup.

The prosecutor later stated that he had not received a copy of "this motion until Wednesday[,]" apparently a reference to July 16, 2003. Judge Daigh later

stated, "He said he set [*sic*] it on the 8th. You said you got it on the 16th. Judge Cheroske denied it. It's denied."

Later, appellant personally addressed the court and inquired if the court were saying it could not rule on appellant's motion to traverse. Judge Daigh replied in the affirmative. Appellant stated the motion had never been filed. Judge Daigh stated that the motion had been denied by another court. Voir dire of prospective jurors commenced.

On Monday, July 21, 2003, the jury and an alternate juror were sworn. During later discussions, Grayson indicated he had not made a motion to disclose the identity of the informant because Grayson wanted to pursue one issue at a time. Later, appellant personally addressed the court and indicated that he could not win at trial if the court denied him due process at every opportunity and he could not present his case. Appellant commented that the court was denying all his motions. The court replied that perhaps appellant's motions should have been denied.

Appellant later indicated he was being "misrepresented" and that he wanted to get his own attorney. The court indicated it would conduct a *Marsden* hearing. During the hearing, appellant asked if he could "go over what's been done to me, . . ." He later indicated he did not want to argue the court's rulings but wanted "to argue what hasn't been done in this court." The court permitted appellant to make a statement.

Appellant complained about various matters and, as pertinent here, indicated the following. The court scheduled the case for June 20, 2003. Appellant spoke to his attorney and the two had agreed on motions. However, "[w]e got to the motions and that day he refused to make them." Appellant came to court on June 27 or 28, 2003, the date set for a pretrial motion, but no one was present.[4] On July 18, 2003,

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[4] The record does not reflect that any proceedings in this case occurred after June 20, 2003, but before July 18, 2003. This suggests appellant was referring to the June 20, 2003 pretrial conference.

appellant was told that a decision had been made on "the motion that I wasn't even aware of." Appellant stated, "You say it was on June the 8th and June the 8th was a Sunday.[5] The district attorney claims he didn't even get the motion until the 16th. And now you are cutting out the only possibility I have of a defense which is this illegal search warrant which I feel is illegal because they used erroneous information."

The court stated, "What does that have to do with your lawyer who has made all the same requests you are? He has made all these motions and I have denied them. It is not like he isn't making the request."

Appellant stated, "[w]e have never had a chance to make any motion yet. . . . I don't know for what reason they weren't done. I was here ready to make them but I was rushed in and out before I had a chance to open my mouth." Appellant later stated, ". . . this is the only way I can continue this case. Then do me the favor and let me declare a mistrial and let me go try and find me a real court with real motions and a real jury that's going to hear the truth."

The court asked Grayson to comment. Grayson indicated, in pertinent part, as follows. Grayson appeared at a pretrial conference which he thought occurred on June 4, 2003. Grayson sat down with appellant and talked about motions that appellant wanted heard, including a Penal Code section 1538.5 motion. Grayson told appellant that Grayson would "get on" those issues that appellant wanted Grayson to "look into[,]" and Grayson "did that." Grayson had researched the motion to traverse and another motion, and had discussed matters with appellant.

Grayson filed the motion to traverse. Given Grayson's demanding schedule, the fact that he had two trials after June 4, 2003, one that lasted ten days and the other which finished July 16, 2003, the numerous issues appellant wanted Grayson to investigate, and the fact that motions to traverse and to discover the identity of confidential informants are complicated, Grayson did not file the motion to traverse

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5 We note Grayson had indicated that on *July* 8, 2003, he had served the prosecutor with the motion to traverse.

until the "8th of July." Grayson came to court on June 20, 2003, but the courtroom was closed and he only "last week" learned that matters in that courtroom had been transferred to another court. The motion to traverse should not have been denied as untimely. Grayson was ready for trial and had contacted the witnesses whom appellant had wanted Grayson to contact.

Appellant personally asked the court if it were too late for him to "go pro per[]" and later asked if it were too late for him to "go pro per with cocounsel[.]" Appellant stated, "I feel since he is probably so busy probably all of them are the same way. [*Sic*.] I have plenty of time to study this."

The court replied there was no such thing as "going pro per with cocounsel." The court indicated Grayson was well prepared for the case. The court stated that "The problem with the case is not a breakdown of the lawyer relationship[,]" but appellant's problem with various court rulings. The court indicated appellant would either represent himself or be represented by Grayson. The minute order printed July 23, 2003, and pertaining to July 21, 2003 proceedings reflects that appellant's "*Marsden* motion" was denied.

b. *Analysis.*

Appellant concedes his motion to traverse the warrant was properly denied as untimely. It was untimely because it was not filed at least 10 court days prior to trial. (Cf. *Moreno v. Superior Court* (1978) 80 Cal.App.3d 932, 935; Pen. Code, § 1538.5, subd. (i).)[6] However, he claims the trial court's denial of his *Marsden*[7] motion was error because Grayson failed to file *timely* the motion to traverse. Accordingly,

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[6] Accordingly, we need not reach the issue of whether the motion to traverse was timely served on the People. We also need not address the significance, if any, of Judge Daigh's May 19, 2003 order that "all pretrial motions and discovery compliance to be heard 30 days prior to trial[,]" an order that arguably referred, not to suppression motions, but only to discovery matters. (See Pen. Code, § 1054.7.)

[7] *People v. Marsden* (1970) 2 Cal.3d 118.

appellant states that "The issue is [Grayson's] failure to file the motion in a *timely* fashion." (Italics added.) We reject the claim.

Marsden held, inter alia, that a defendant must be permitted to state the *reasons* why the defendant believes court-appointed counsel should be discharged. (*People v. Lewis* (1978) 20 Cal.3d 496, 497; accord, *People v. Hidalgo* (1978) 22 Cal.3d 826, 827 [trial court reversibly erred by denying defendant's *Marsden* motion without giving him an opportunity to state *specific grounds* for his dissatisfaction with counsel.]) As appellant observes, denial of a *Marsden* motion is not an abuse of discretion "unless the defendant has *shown* that a failure to replace the appointed attorney would '*substantially impair*' the defendant's right to assistance of counsel[]" (*People v. Webster* (1991) 54 Cal.3d 411, 435, italics added) or "unless defendant has made a substantial *showing* that failure to order substitution is *likely* to result in constitutionally inadequate representation." (*People v. Crandell* (1988) 46 Cal.3d 833, 859, italics added.) Moreover, an appellate court's review of a *Marsden* motion is limited to matters developed during the course of the *Marsden* hearing. (*People v. Earp* (1999) 20 Cal.4th 826, 877, fn. 5.)

The court did not err by denying the *Marsden* motion. "In *Franks v. Delaware* (1978) 438 U.S. 154 [98 S.Ct. 2674, . . .], the United States Supreme Court held that a defendant may challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower courts must conduct an evidentiary hearing *if a defendant makes a substantial showing that: (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth* and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to justify a finding of probable cause. At the evidentiary hearing, if the statements are proved by a preponderance of the evidence to be false or reckless, they must be considered excised. If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized

pursuant to that warrant must be suppressed. (*Id*. at pp. 155-156 . . . .)" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297, italics added.)

"Moreover, 'there is a presumption of validity with respect to the affidavit. To merit an evidentiary hearing[,] the defendant['s] attack on the affidavit must be more than conclusory and must be supported by more than a mere desire to cross-examine. . . . The motion for an evidentiary hearing must be "accompanied by an offer of proof . . . [and] should be accompanied by a statement of supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished," or an explanation of their absence given. [Citation.]' (*People v. Sandlin* [(1991)] 230 Cal.App.3d [1310,] 1316, quoting *Franks, supra*, 438 U.S. at p. 171 . . . .) [¶] 'Mere conclusory contradictions of the affiant's statements are insufficient for the "substantial preliminary showing" *Franks* requires.' (*People v. Sandlin*, *supra*, 230 Cal.App.3d at p. 1318.)" (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 272.) And "self-serving denials alone . . . are routinely discounted in determining whether a showing for a *Franks* hearing has been made out." (*People v. Benjamin*, *supra*, 77 Cal.App.4th at p. 274.) Absent the requisite substantial showing, a defendant is not entitled to an evidentiary hearing on a motion to traverse, and the motion is properly denied. (Cf. *People v. Benjamin*, *supra*, 77 Cal.App.4th at pp. 267, 277.)

Appellant's argument emphasizes the issue of the untimely filing of the motion to traverse but not its substance.[8] We have set forth the pertinent portions of Grayson's supporting declaration. His statements were merely conclusory contradictions of the affiant's statements.

Moreover, Grayson, in his unsworn memorandum of points and authorities signed only by him, urged that the affiant stated that "rock cocaine could be

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8 We note appellant raises no issue here concerning the *facial* sufficiency of the probable cause statement in the warrant's affidavit, that is, this is not a case in which appellant claims that a trial court's denial of a *Marsden* motion was error because appellant showed during such a motion that he received ineffective assistance of counsel by reason of Grayson's failure to file a motion to *quash* the warrant and suppress evidence. We presume the probable cause statement was sufficient.

purchased from Black males at 137 W. 90th Street in Los Angeles. Based on this blatantly false information, a search was conducted, but no Black males were found on or about the premises, and no rock cocaine nor any other form of cocaine was found on the premises, nor on any person (all of whom were Latino, not Black) found on or about the premises." However, the affiant did not state that "rock cocaine could be purchased from Black males" at the address. The affiant opined that execution of the warrant would result in the seizure of, inter alia, "evidence *tending* to show a conspiracy between the male Blacks at the location *and others*" to buy and sell rock cocaine. (Italics added.) The affidavit did not specify the race or gender of the persons referred to as "others."

Further, the affiant received information on Wednesday, March 26, 2003, from an anonymous source. The controlled buy occurred sometime "[d]uring the same week[]" and, therefore, could have occurred as late as Saturday, March 29, 2003. The warrant was issued at 12:06 p.m. on Thursday, April 3, 2003, and execution of the warrant occurred later still. Thus, a period elapsed between the controlled buy, and the execution of the warrant. Accordingly, the facts, if true, that, when the warrant was executed, no Black males were found on or about the premises, no cocaine was found there or on any person there, and only Hispanics were present did not constitute the requisite substantial showing.

Further still, nothing in the motion to traverse or supporting documents indicated, reliably or otherwise, when the warrant was executed. Nothing in those documents presented reliable statements supporting appellant's premise that, when the warrant was executed, no Black males were found on or about the premises, no cocaine was found there or on any person there, and only Hispanics were present.

Grayson later urged in his memorandum of points and authorities that the "search was based solely on the affiant [*sic*] supposedly having purchased rock cocaine from Black males[,]" and "the affiant made the statements knowing this was not true." However, nowhere did the *affiant* state that *he* bought rock cocaine; he only stated that the *CRI* bought an off-white solid resembling rock cocaine.

Moreover, to the extent appellant suggests the affiant stated that the CRI bought anything directly from Black males, we have rejected that suggestion, *ante*. Finally, the affiant stated that (1) an "unknown suspect" retrieved the money and (2) the CRI stated that the CRI could not identify the suspect. Grayson's statement that the affiant knew that the affiant's statements were false was conclusory and unsupported.

Grayson also urged in the memorandum that the "affiant" (*sic*) bought rock cocaine from three to four Black males on March 26, 2003, "yet only eight days later, the premises are suddenly occupied by Latinos in possession of small amounts of *heroin*[,]" (italics in original) and "[o]ne can only conclude" that the statements were false. However, leaving aside the fact that the affiant did not state that *he* bought *rock cocaine* from *Black males*, we note the affiant stated that what happened on March 26, 2003, was that *he received information* from an anonymous source. The affiant did not state when the controlled buy occurred except to state it occurred "[d]uring the same week[.]" In light of the period between the controlled buy and execution of the warrant, the facts, if true, that, when the warrant was executed, the premises were occupied by Hispanics possessing heroin did not constitute the requisite substantial showing. And nothing in the motion to traverse or supporting documents indicated, reliably or otherwise, that "eight days later" the premises were occupied by Hispanics possessing heroin.

No affidavits or otherwise reliable statements of *witnesses* were furnished with the motion to traverse, nor was an explanation of their absence given. Appellant did not, in his motion and supporting documents, ever expressly refer to the preliminary hearing transcript or its contents, and we reject any suggestion that his written motion's reference to "all other papers, [and] records, . . . on file in this action, . . ." adequately referred to that transcript and/or required the trial court to canvass it for alleged facts controverting the warrant affidavit.

Thus, the motion to traverse, and its supporting documents, do not provide the requisite substantial showing for an evidentiary hearing. Although we review a *Marsden* motion based on the matters developed during the course of the *Marsden*

hearing (*People v. Earp*, *supra*, 20 Cal.4th at p. 877, fn. 5), we note that, even now, appellant does not, in his opening brief or reply brief, direct our attention to anything in the record, except the motion to traverse and supporting documents, to corroborate his claim that he had made the requisite substantial showing. Absent that showing, appellant would not have been entitled to an evidentiary hearing on the motion to traverse, and it properly would have been denied. (Cf. *People v. Benjamin*, *supra*, 77 Cal.App.4th at p. 272; *People v. Duval* (1990) 221 Cal.App.3d 1105, 1112-1113.)

If a *Marsden* motion properly may be denied where the motion is based on a counsel's failure to file a useless suppression motion (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1218-1220), we see no reason why denial would have been inappropriate where such a motion was filed late. We conclude the trial court did not abuse its discretion by denying appellant's *Marsden* motion, since appellant failed to show that, by reason of Grayson's failure to file timely the motion to traverse, a failure to substitute counsel would have *substantially impaired* appellant's right to assistance of counsel or would have *likely* resulted in constitutionally inadequate representation. (Cf. *People v. Webster*, *supra*, 54 Cal.3d at pp. 435-436; *People v. Crandell*, *supra*, 46 Cal.3d at p. 859.)

2. *The Trial Court Did Not Reversibly Err by Denying Appellant's Request to Represent Himself, Since the Request Was Equivocal and Untimely.*

a. *Pertinent Facts.*

Pertinent facts are set forth in part 1.a. *ante*. In addition, after the court, on July 21, 2003, denied appellant's *Marsden* motion, appellant personally asked whether Grayson would "have to go to court today or can we start this over . . . ." The court replied it could not start over. Appellant responded, "In this case I might as well if you would allow me to go pro per." The court asked why appellant wanted to do that. Appellant later complained about trial court rulings, and the court and appellant discussed his ability to represent himself. Appellant later stated "I feel that this is the only justice that I can see -- I would have more time, more ample time given the pro per status."

The court stated, "Well, the trouble is you won't because if I allow you to go pro per -- and I don't know that I will -- you have to be ready now to give an opening statement. You have to be ready today to question the witnesses. Because of the late request, you are not going to have any classification as to pro per. You are not going to have access to books overnight. We will come back tomorrow and you will be expected to pick it up. If you would have said this three or four weeks ago, it would have made more sense. If you ask for it now, I don't know how you can prepare for a trial that's in session already."

Appellant indicated he wanted to represent himself and wanted the court to grant a mistrial, and, if the court granted his requests, he would be in a better position to try the case than he would be if he attempted to "do it overnight[.]" Appellant acknowledged he could not "do it overnight." The court asked if appellant wanted to represent himself if the court denied his request for a continuance. Appellant replied that if the court denied his request, appellant had "absolutely nothing to say about anything." Appellant admitted that if the court denied his motion for a mistrial, he could not prepare overnight.

The following then occurred: "The Court: So if I grant your mistrial motion, then I will put it over, appoint you pro per and give you time to prepare. If I deny your mistrial motion, you can't get ready in the next five minutes or overnight to represent yourself, right? [¶] The Defendant: Right." The court indicated it would think about the matter.

After a pause in the proceedings, appellant told the court that if it were willing to grant a mistrial and let appellant and Grayson "start all over again," appellant would be willing to "waive the time[.]"

The court denied appellant's requests for a mistrial and continuance, and stated, "[w]e are going to proceed as we have." The minute order printed July 23, 2003, pertaining to July 21, 2003 proceedings reflects that appellant's motion to represent himself was denied. The court later preinstructed the jury and opening statements were made.

b. *Analysis.*

Appellant claims the trial court erroneously denied his July 21, 2003 request to represent himself. As evidence of that request, he cites to page 43 of the reporter's transcript, which begins with appellant's statement, "In this case I might as well if you would allow me to go pro per." We reject appellant's claim.

First, appellant's request to represent himself was not unequivocal. After appellant's alleged request to represent himself, but before the court ruled on the alleged request, appellant indicated that if the court were willing to grant the mistrial and let appellant and Grayson start over, appellant would be willing to waive time. Appellant thereby signaled that he was conditionally willing to be represented by Grayson. Appellant's vacillation between indicating that he wanted self-representation, then counsel, rendered equivocal any request by appellant to represent himself. The trial court was not required to grant an ambivalent request for self-representation. (See *People v. Marshall* (1997) 15 Cal.4th 1, 20-22 [*Marshall*].)

Moreover, it clear from this record that appellant's request to represent himself resulted from frustration with trial court rulings. The trial court was not obligated to grant a request for self-representation based on passing frustration with court rulings. (*Ibid.)* Further, it is equally clear from this record that what appellant truly desired was not to represent himself, but a mistrial which, in appellant's mind, would have permitted him to start over, continue the matter, and litigate for the first time the motion to traverse. The court's denial of any request by appellant to represent himself was proper under either a de novo, or substantial evidence, standard of review (*People v. Marshall*, *supra*, 15 Cal.4th at p. 25) because any such request was equivocal.

Second, appellant made his request to represent himself, not merely on the eve of, but *during*, trial, and (notwithstanding appellant's assertion to the contrary) after the jury was sworn. Appellant concedes his request to represent himself was "late." Accordingly, the request for self-representation was untimely and simply addressed to the wide discretion of the court. (Cf. *People v. Clark* (1992) 3 Cal.4th 41, 99-100;

People v. Windham [(1977)] 19 Cal.3d [121,] 128, fn. 5.) And, in light of the five factors required to be considered in the exercise of that discretion (*People v. Windham, supra*, 19 Cal.3d at p. 128), the court's denial of the request for self-representation was proper.

First, as to the quality of counsel's representation of appellant, we have set forth the pertinent facts, *ante*. Grayson provided effective representation of appellant. Judge Daigh commented that Grayson was well prepared. We note that as late as July 21, 2003, and just before his motion to represent himself, appellant indicated he was conditionally willing to be represented by Grayson.

Second, appellant demonstrated his proclivity to substitute counsel by his previous baseless *Marsden* motion, which was denied. (*People v. Clark, supra*, 3 Cal.4th at p. 100.) Third, as to the reasons for appellant's request to represent himself, appellant did not provide a reasonable basis for dissatisfaction with Grayson's performance. Fourth, appellant waited until after the jury was sworn to request self-representation. Fifth, substantial delay would have followed the granting of appellant's request. Appellant "concedes that there would have been some disruption and delay" from granting the request for self-representation.

Appellant claims that the trial court improperly and coercively "told appellant that he would have to proceed immediately to trial without any pro. per. law library privileges if granted the right to represent himself." We disagree, since a midtrial *Faretta* motion may be denied on the ground that delay or a continuance would be required. (*People v. Valdez* (2004) 32 Cal.4th 73, 103, italics added.)

Moreover, notwithstanding appellant's claim to the contrary, the court did not state that the *court* would deny appellant pro per "classification" or access to books, or that any such denial would be permanent. The court reasonably may be understood to have meant only that, in light of what the court referred to as appellant's "late request," appellant could not expect such "classification" or books from *jail authorities* on such short notice. We note the trial court stated that appellant would not have access to books "overnight," and did not state appellant

would be denied such access permanently. We also note the time estimate for trial was merely two or three days. In any event, appellant's claim is mooted by his concession below that he could not prepare overnight or absent the court granting the mistrial.

We conclude the trial court did not abuse its discretion by denying appellant's request for self-representation. (Cf. *Marshall, supra,* 15 Cal.4th 1, 20-27; *People v. Clark, supra,* 3 Cal.4th at pp. 98-101; *People v. Perez* (1992) 4 Cal.App.4th 893, 903.) Finally, in light of the strength of the evidence of appellant's guilt, any error in denying appellant's untimely motion to represent himself was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Nicholson* (1994) 24 Cal.App.4th 584, 594.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.